IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 1628 OF 2017

Virendra Mehta ….Petitioner

Vs.

Ibrahim M. Patankar and Ors … Respondents

Ms. Chitra Rentala a/w Mr. Chandansingh Shekhawat
i/b ALMT Legal Advocate for Petitioner
Ms. Neeta Jain APP for the State.

CORAM: SMT.SADHANA S.JADHAV, J.
DATED : 5th MAY , 2017.

P.C.

1) Heard.

2) Rule. Rule made returnable forthwith with the consent of the parties.

3) Petitioner herein is facing prosecution for offence punishable under section 138 of Negotiable Instruments Act in Criminal Case No. 152/SS/2014 pending before Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai.

4) That complainant herein had approached the Metropolitan Magistrate,

Mazgaon, Mumbai and filed a complaint against the accused for offence punishable under section 138 r/w 141 of Negotiable Instruments Act alleging therein that he is the Constituted Attorney of Dilip Kumar Nagpal. That proposed accused no. 2 to 5 are the Directors and accused no. 6 is finance manager and they are in charge and responsible for the day to day conduct and affair of accused no. 1 Company at all relevant times. That accused no. 2 had issued a cheque for a sum of Rs. 6,50,000/-. That all the accused had accepted the liability of the legally enforceable debt. The complainant had presented the said cheque for encashment to Central Bank of India, Marine Lines on 02/08/2013. The said cheque was dishonoured. Thereafter, on 10/08/2013, complainant had issued statutory notice to all the proposed accused persons. Present petitioner had not replied the statutory notice. Therefore, the complainant was constrained to file complaint under section 138 r/w 141 of Negotiable Instruments Act. It appears that after recording of verification, the learned Magistrate had applied his judicial mind and had issued process against all the accused.

5) Present petitioner is challenging the order of issuance of process. It is

an admitted position that no revision under section 397 of Code of Criminal Procedure, 1973 was filed.

6) The learned counsel for the petitioner submits that petitioner need not avail off alternative remedy and that by itself would not be an embargo to approach this Court under Article 227 of Constitution of India. Needless to say that the petition has been filed on 12/04/2017 challenging the order of issuance of process dated 07/03/2014. It is apparent on the face of the record that in order to give a go by to the period of limitation, writ petition is preferred in this Court.

7) The learned counsel for the petitioner submits that petitioner had resigned from the company as a Director in the year 2010 itself and that the cheque was issued in the year 2013 and therefore, he was not liable for the legally enforceable debt. It is a matter of record that statutory notice was not replied and therefore, complainant had no occasion to have knowledge that the petitioner had resigned from the company and therefore, he should not have been arraigned as an accused. It is incumbent upon the petitioner to

reply to the said statutory notice that he has resigned from the company.

8) Learned counsel for the petitioner has placed implicit reliance upon form no. 32 which shows that petitioner had ceased to be a Director, however, complainant had no occasion to controvert the said documents and in any case, in the eventuality that the said document is controverted and contested, the Court can place implicit reliance upon it. It would be a matter of substantive evidence.

9) The learned counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Harshendra Kumar D. V/s. Rebatilata Koley and Others [2011 (3) S.C.C. 351]**. The learned counsel has drawn the attention of this Court to para 16 of the said Judgment wherein it is observed that:

> “*The words “every person who, at the time the offence was committed”, occurring in Section 141 (1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed”*.

10) The court cannot be oblivious of observations of the Hon'ble Apex Court in the same Judgment. It is also observed that the said documents have to be placed for admission or denial. The documents to be relied upon have to be un-controverted.

11) The learned counsel submits that in the case of co-accused, the complainant has not assigned any reasons for controverting the said documents and therefore, the same cannot be considered. It is pertinent to note that in the citation relied upon by the petitioner, it was clear that accused had placed all relevant documents before the Revisional Court as well as the before the High Court and the same was not taken into consideration.

12) As far as the present case is concerned, this Court was inclined to issue notice to complainant to give him opportunity to controvert the documents, however, the learned counsel for the petitioner insisted upon hearing of the petition and staying the proceedings. Therefore, this Court has proceeded with the merits of the matter.

13) It would not be possible for any complainant to know that a particular Director had resigned from the company. In the absence of knowledge, the complainant was right in prosecuting the present petitioner for offence punishable under section 138 r/w 141 of Negotiable Instruments Act. That the matter is pending before the learned Magistrate. By now the plea is recorded.

14) Section 141 of Negotiable Instruments Act reads thus:

> "***Offences by companies –*** *(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly"*.
>
> *Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or the financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly".

14) It is rebuttable presumption and the presumption drawn under section 139 of the Negotiable Instruments Act can be rebutted in the course of trial. No case for interference is made out.

15) Rule is discharged.

(SMT. SADHANA S. JADHAV, J.)

ism